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Evidence--Hearsay Exceptions--Admission of Principal's Extrajudicial Declarations Against Surety--Res Gestae Requirement Abandoned (Letendre v. Hartford Accident & Indemnity Co., N.Y. 1968)

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RECENT DECISIONS

EVIDENCE — HEARSAY EXCEPTIONS — ADMISSION OF PRINCIPAL'S EXTRAJUDICIAL DECLARATIONS AGAINST SURETY — RES GESTAE REQUIREMENT ABANDONED. — In an action by an employer to recover on a fidelity bond for the defalcations of an employee, the employer sought to introduce extrajudicial written statements of the employee, admitting the theft, some of which were made after the termination of employment. The New York Court of Appeals *held* that the statements were admissible against the surety, the test not being whether the statements were part of the *res gestae*, but whether the declarant was available for cross-examination and whether in fact the statements were actually made. *Letendre v. Hartford Accident & Indemnity Co.*, 21 N.Y.2d 518, 236 N.E.2d 467, 289 N.Y.S.2d 183 (1968).

At early common law, juries conducted their own independent investigation in order to arrive at conclusions of fact.[1] Under modern procedure, however, they are limited to the evidence presented at trial by the respective parties. Since the purpose of the fact-finding process is to arrive at the truth, the law deems it necessary at times to exclude certain testimony from the jury, which if presented, would pose a danger of misleading the triers of fact and, therefore, distort the fact-finding process.[2]

The method that the adversary process employs to determine the truth is similar to that used in the Hegelian dialectic, *i.e.*, from the battle of opposites comes the truth. Therefore, by subjecting the testimony of a witness to cross-examination, it is felt that mistakes and lies will be weeded out and exposed.[3] Without cross-examination, an essential element of the truth-finding process would not be present. It is such a deprivation of the right to cross-examine which constitutes the principal justification of the hearsay rule.[4]

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[1] E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 107 (1956): "The jurors were free to consult any source which they deemed reliable, and, indeed, were expected to supplement, before their appearance in court, what personal knowledge they had concerning the facts by inquiry of others, including the parties." *See also* E. MCCORMICK, EVIDENCE § 223 (1954).

[2] Buchanan v. Nye, 128 Cal. App. 2d 582, 275 P.2d 767 (1954).

[3] Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 185 (1948).

[4] W. RICHARDSON, EVIDENCE § 207 (9th ed. 1964). *See* NLRB v. Imparato Stevedoring Corp., 250 F.2d 297 (3rd Cir. 1957); Pettus v. Casey, 358 S.W.2d 41 (Mo. 1962); Cooper Corp. v. Jeffcoat, 217 S.C. 489, 61 S.E.2d 53 (1950).

Hearsay is a statement of testimonial value, offered to prove the truth of the matters asserted therein.[5] If the statement is offered to prove or establish some fact other than that asserted in the statement itself, then it is not hearsay.[6] For example, if at an incompetency hearing, an extrajudicial declaration of the alleged incompetent is offered, wherein he stated he was the "Emperor of Africa," it will be admitted since the purpose of submitting the statement is not to prove its truth, but rather, the abnormal mental state of the patient.[7] The theory of hearsay involves the situation wherein the trier must depend upon the declarant, not the witness on the stand who relates the statement, for the statement's veracity. Generally a witness may testify to the *acts of another*, for this involves only the witness' perception of facts, which may be cross-examined. The hearsay rule excludes a witness' testimony as to the *statements of another*, for this involves the perception of facts by the other, who, being absent, can not be cross-examined. Thus, the basic objection to admitting the statement is that the trier must look to someone not in the courtroom for its accuracy and veracity.[8]

However, it is not in itself sufficient that the opportunity for cross-examination be present to avoid the objection of hearsay.

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[5] Northern Trust Co. v. Moscatelli, 54 Ill. App. 2d 316, 203 N.E.2d 447 (1964); Stevenson v. Abbott, 251 Iowa 110, 99 N.W.2d 429 (1959); Still v. Travelers Indem. Co., 374 S.W.2d 95 (Mo. 1963); McCord v. Ashbaugh, 67 N.M. 61, 352 P.2d 641 (1960).

[6] Dussault v. Condon, 170 Cal. App. 2d 693, 339 P.2d 896 (1959); Prudential Ins. Co. v. Sommers, 148 Col. 212, 365 P.2d 544 (1961) (statement of declarant admitted to prove his mental state, not to prove that it was true); Gass v. Garducci, 37 Ill. App. 2d 181, 185 N.E.2d 285 (1962) (previous statement of defendant concerning the likelihood that a car door might open, introduced not to prove that fact, but to establish defendant's knowledge of it).

[7] Similarly, if in an action for fraud, the plaintiff offers as evidence statements of the defendant that a valueless object was worth hundreds of dollars, such evidence would not be submitted to prove the truth of the matters asserted therein, and would therefore be admissible. *See* 6 J. WIGMORE, EVIDENCE § 1766 (3rd ed. 1940) for a discussion, and further examples, of when the hearsay rule does not apply; *see also* E. MCCORMICK, EVIDENCE § 228 (1954).

[8] E. MCCORMICK, EVIDENCE § 224 (1954):

> 'A person who relates a hearsay is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities; he entrenches himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.'

See also Rice v. Moudy, 217 Ark. 816, 233 S.W.2d 378, 380 n.3 (1950): "Evidence is hearsay when its probative force depends on the competency and credibility of some person *other than the witness*" (emphasis added); Shinn v. Francis, 404 P.2d 1017, 1022 (Okla. 1965); Williams v. Morris, 200 Va. 413, 105 S.E.2d 829, 832 (1958); Cameron v. Boone, 62 Wash. 2d 420, 383 P.2d 277, 282 (1963).

There will be situations where the particular time at which the opportunity arises will determine the application of the hearsay rule. For example, the prior statement of a witness, now in court, under oath and subject to cross-examination, is objectionable as hearsay even though none of the substantial hearsay risks are involved and it is difficult to justify classifying his prior statement as hearsay.

> Although there are numerous dicta accepting . . . [the view] that hearsay is that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests also, in part, on the veracity and competency of *some other person,* the dictum rarely becomes decision. The courts declare the prior statement [of the witness] to be hearsay because it was not . . . subject to . . . the test of cross-examination [when made].[9]

As a result, the presence of the witness in the courtroom will not alone be sufficient to remove the hearsay objection in all instances.[10] The rule is that the statement, *when made,* must be subject to cross-examination.

Despite the general rule, the previous statements of a witness are not completely inadmissible as hearsay. An attorney may introduce a previous statement of a witness which is inconsistent with his present position for the purpose of impeaching the credibility of the witness.[11] However, such statements may not be used as affirmative substantive evidence of the truth of the matter asserted therein[12] unless: (a) the declarant-witness is

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[9] Morgan, *supra* note 3, at 192 (emphasis added). This is true only when the witness is not a party to the action. When he is such a party, his previous inconsistent statements may be introduced as affirmative evidence against him.

[10] The position of the courts is that when a statement is offered as evidence, the credit of the assertor becomes the basis of the inference, and therefore the statement can be received only when made upon the stand, subject to cross-examination—not when made extrajudicially. Petition of Earle, 355 Mich. 596, 95 N.W.2d 833 (1959); Mash v. Pacific R.R., 341 S.W.2d 822 (Mo. 1960).

[11] United States v. Ploof, 311 F.2d 544 (2d Cir. 1963); Rogers v. Saye, 106 Ga. App. 453, 127 S.E.2d 161 (1962); People v. Moses, 11 Ill. 2d 84, 142 N.E.2d 1 (1957).

[12] *See, e.g.,* Green v. Baltimore & Ohio Ry., 337 F.2d 673 (6th Cir. 1964); *In re* Dalton's Estate, 346 Mich. 613, 78 N.W.2d 266 (1956); People v. Freeman, 9 N.Y.2d 600, 176 N.E.2d 39, 217 N.Y.S.2d 5 (1961). Some courts have indicated that the admission of evidence for impeachment purposes is an exception to the hearsay rule. United States v. Ploof, 311 F.2d 544 (2d Cir. 1963); Foryan v. Firemen's Fund Ins. Co., 27 Wisc. 2d 133, 133 N.W.2d 724 (1965). This is not accurate, in that the evidence, having no substantive value, may not be used to prove the truth of the matter asserted therein. Hearsay is involved only where there is such an attempt to prove the truth of the matter asserted. *See supra,* notes 5-7, and accompanying text.

a party to the action,[13] (b) the witness under cross-examination admits the truth of the previous statement,[14] or (c) the previous statement comes within a recognized exception to the hearsay rule.[15] Therefore, if the only evidence of some essential fact is in the inconsistent previous statement, and none of the above mentioned exceptions have been met, the party's case must fail since the evidence would have no substantive value, and there would not be evidence sufficient-in-law for the jury to base a verdict upon.[16]

Therefore, in spite of its underlying logic, the hearsay rule is not an inflexible one and judges have continually developed exceptions thereto.[17] These exceptions have been allowed where there is a necessity that the evidence be admitted and the circumstances are such that the safeguard of cross-examination may be omitted without endangering the trustworthiness of the particular testimony in question.[18] Of the numerous exceptions to the hearsay rule,[19] three are of particular importance for an understanding of the principal-surety rule which is applicable in a situation where the principal seeks to introduce the statements of the employee in order to recover from the surety. They are declarations against interest, vicarious admissions, and *res gestae*. It is submitted, and will be developed subsequently, that although it is usually under the third exception that statements of a principal are admitted against his surety, the justification and theoretical basis for this admission of evidence derives from the first two exceptions.

The first exception, declarations against interest, rests on the premise that one would not make a statement against his pecuniary or proprietary interest unless he believed that state-

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[13] Texter v. State, 170 Neb. 426, 102 N.W.2d 655 (1960); Stoelting v. Hauck, 32 N.J. 87, 159 A.2d 385 (1960); Bizich v. Sears, Roebuck & Co., 391 Pa. 640, 139 A.2d 663 (1958).

[14] Schratt v. Fila, 371 Mich. 238, 123 N.W.2d 780 (1963); State v. Davis, 400 S.W.2d 141 (Mo. 1966); Jones v. Lenoir City Car Works, 216 Tenn. 351, 392 S.W.2d 671 (1965).

[15] For example, declarations against interest, vicarious admissions, and *res gestae*, discussed *infra*.

[16] Globe Indem. Co. v. Richerson, 315 F.2d 3 (5th Cir. 1963); Eisenberg v. United States, 273 F.2d 127 (5th Cir. 1959). This is of crucial significance in an action to recover on a fidelity bond, wherein the only evidence of the defalcation is the principal's admission of theft, made to the employer, which the employee then denies at trial.

[17] *See, e.g.*, G.M. McKelvey Co. v. General Cas. Co., 166 Ohio St. 401, 142 N.E.2d 854 (1954).

[18] WIGMORE, EVIDENCE, *supra* note 7, at § 1421. *See also* Dallas County v. Commercial Union Assur. Co., 286 F.2d 388 (5th Cir. 1961).

[19] The Uniform Rules Of Evidence lists 31 exceptions. UNIFORM RULES OF EVIDENCE, Rule 63.

ment to be true.[20] An unusual aspect of this exception is that in certain jurisdictions, a statement against one's penal interest is not sufficient to come within the exception's purview.[21] In addition to the requirement that the declaration be against one's interest, it is almost universally required that the declarant be unavailable for testimony.[22]

Vicarious admissions are also considered by the courts as an exception to the hearsay rule, although some commentators have classified them as outside the scope of that rule.[23] The theory behind vicarious admissions is that if there is sufficient privity between two parties, *A* and *B*, the admissions of *A* can be imputed to *B*. Inasmuch as the law then considers *B* to be making the admission, he cannot object that he did not have the opportunity to cross-examine himself.[24] Thus, the vicarious admissions exception is based substantially on principles of agency. For example, in order for the admission of an employee to be imputed to his employer, there are two basic requisites: (a) an agency must exist by which the agent is authorized to act and speak in the principal's interest,[25] and (b) the statement must be contemporaneous, or nearly so, with the fulfillment of the particular duties of the

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[20] *See, e.g.*, Wirthlin v. Mutual Life Ins. Co., 56 F.2d 137 (10th Cir. 1932); Kittredge v. Grannis, 244 N.Y. 168, 155 N.E. 88 (1926).

[21] *See, e.g.*, McGraw v. Horn, 134 Ind. App. 645, 183 N.E.2d 206 (1962).

[22] Levy v. American Auto. Ins. Co., 31 Ill. App. 2d 157, 175 N.E.2d 607 (1961); Forrest County Cooperative Assoc. v. McCaffrey, 253 Miss. 486, 176 So. 2d 287 (1965); Brown v. Warner, 78 S.D. 647, 107 N.W.2d 1 (1961). The courts have been specific in defining unavailability in a number of cases. *See, e.g.*, Frazure v. Fitzpatrick, 21 Cal. 2d 851, 136 P.2d 566 (1943) (death); G.M. McKelvey Co. v. General Cas. Co., 166 Ohio St. 401, 142 N.E.2d 845 (1954) (insanity and sickness); Johnson v. Sleizer, 268 Minn. 421, 129 N.W.2d 761 (1964) (absence from jurisdiction); Alexander Grant's Sons v. Phoenix Assur. Co., 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966) (refusal to testify based on privilege against self-incrimination). *But see* People v. Spriggs, 60 Cal. 2d 868, 389 P.2d 377, 63 Cal. Rptr. 841 (1964).

[23] 2 C. CHAMBERLAYNE, EVIDENCE § 1292 (1911): "The competency of an admission is not so much an exception to the rule excluding hearsay as based upon a quasi-estoppel which controls the right of a party to disclaim responsibility for any of his statements." *See also* 2 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 266 (1961).

[24] MORGAN, *supra* note 23, at 266, 272.

[25] Cromling v. Pittsburgh & Lake Erie R.R., 327 F.2d 142 (3rd Cir. 1963); Pannell v. Fauber, 201 Va. 380, 111 S.E.2d 445 (1959). It must be borne in mind that an authority to act does not necessarily imply an authority to speak. Dillon v. Wallace, 148 Cal. App. 2d 447, 306 P.2d 1044 (1957); 2 C. CHAMBERLAYNE, EVIDENCE § 1341 (1911); Morgan, *Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 464 (1929). Illustrative is the situation in which a negligent chauffeur makes a statement admitting his fault, and the injured party seeks to introduce this statement against the employer. *Id.*

agency.[26] Although the agency may still exist, present narration of past events by the agent is inadmissible.[27]

The distinctions between a declaration and an admission are threefold:

(1) admissions must be made by a party or one in privity with a party, whereas declarations may be made by disinterested third persons; (2) admissions are acceptable in evidence as inconsistent with the party's *present* position, whereas declarations are acceptable as contrary to the declarant's interest *when made;* (3) admissions function as waivers of proof, whereas declarations are admitted as proof of the facts stated.[28]

The third distinction is of particular importance. If the agent's statement qualifies only as a declaration against interest, it then constitutes only some proof of the principal's liability. If the statement qualifies as a vicarious admission, then it is treated as a personal admission by the principal, further proof thereby being unnecessary.

Res gestae as a term has come under great criticism because of its lack of precision and the poverty of thought it conveys.[29] The term means literally things done, or that which has been done, a translation which is of little help in defining its true nature. Under this term, two separate exceptions have developed, having separate theoretical bases and justifications.

The first branch of *res gestae* is the verbal act concept. As has been stated, a witness may testify to the *acts* of another and

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[26] Patterson v. Pennsylvania R.R. Co., 238 F.2d 645 (6th Cir. 1956); Roush v. Alkire Truck Lines, 299 S.W.2d 518 (Mo. 1957). New York originally required that the agent's statements be strictly contemporaneous with the act in question in order to bind the principal. Schner v. Simpson, 286 App. Div. 716, 146 N.Y.S.2d 369 (1st Dep't 1955). There are indications though, that such is not the requirement today. Bransfield v. Grand Union Co., 17 N.Y.2d 474, 214 N.E.2d 981, 266 N.Y.S.2d 981 (1965) (mem.).

[27] In general, under agency law, the agent is not authorized *post factum* to discuss his principal's conduct, affairs, rights or liabilities. It is only while the business is carried on that the agent may affect the principal by his statements. C. CHAMBERLAYNE, HANDBOOK ON THE LAW OF EVIDENCE § 542 (1919).

[28] Note, *Declarations Against Interest: A Critical Review Of The Unavailability Requirement*—Alexander Grant's Sons v. Phoenix Assurance Co., 52 CORNELL L.Q. 301, 311 (1967).

[29] For example, see United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944), where Circuit Judge Learned Hand observed: ". . . as for 'res gestae' . . . if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms," and 6 J. WIGMORE, EVIDENCE § 1745 (3d ed. 1940) where the author notes that there has been such a confounding of ideas, and such a profuse and indiscriminate use of the shibboleth *'res gestae,'* that it is difficult to disentangle the real basis of principle involved."

his testimony is admissible. The hearsay objection usually arises when the other's *statements* are introduced by the witness. However, a statement may be the "act" at issue, such as an acceptance of an offer, or it may be so intertwined with an act so as to be considered part of it. In such a situation, the statement, being a part of the act, illustrating its character, may be testified to by the witness.[30] As with vicarious admissions, a theory has been advanced that this situation is not within the scope of the hearsay rule, rather than an exception to it.[31]

The second branch of *res gestae* is termed "spontaneous declarations." The rationale of this exception is that under the stress of circumstances, such as an accident, the reflective faculties are stilled, and the true perceptions of the declarant are revealed.[32] Essential to this exception are its operative element—spontaneity and its evidentiary element—substantial contemporaneity.[33] While a greater time period between the event and the statement affords a greater opportunity to fabricate—and vice versa—the mere fact that the statement did not coincide exactly in time and place with the event does not control. The pertinent point is rather whether there was sufficient time to allow an opportunity for reflection and invention.[34]

Originally, the courts applied the verbal act branch of *res gestae* to the principal-surety situation. Thus, an admission of theft by the principal (employee), in order to be admissible against the surety, had to be contemporaneous with the theft, so as to be considered part of the act.[35] However, the majority of jurisdictions gradually redefined *res gestae* to make it synonymous with the period of employment and the rule emerged that the statement made by the principal, while still employed is admissible against

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[30] *See* 2 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 328 (1961).

[31] 6 J. WIGMORE, EVIDENCE § 1766, et seq. (3d ed. 1940).

[32] *Id.* at § 1747:

> Since this utterance is made under the immediate and uncontrolled dominion of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy . . . and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to those facts.

[33] *See* United States v. Mountain State Fabricating Co., 282 F.2d 263 (4th Cir. 1960); Rockford Clutch Div., Borgwarner Corp. v. Industrial Comm., 37 Ill. 2d 62, 224 N.E.2d 830 (1967); Clinton G. Caudwell, Inc. v. Patterson, 133 Ind. App. 138, 177 N.E.2d 490 (1961).

[34] *See* Ellis v. Southern Ry., 96 Ga. App. 687, 101 S.E.2d 230 (1957); Perkins v. Chicago Transit Auth., 60 Ill. App. 2d 431, 208 N.E.2d 867 (1965); Roland v. Beckham, 408 S.W.2d 628 (Ky. 1966).

[35] Stetson v. City Bank of New Orleans, 2 Ohio St. 167 (1853). *See also* notes 39-45, *infra*.

the surety as part of the *res gestae*.[36] Conversely, a statement made after the termination of employment is inadmissible.

The basis of the principal-surety rule has also been characterized in terms of vicarious admissions and agency. The employee is considered an agent of the surety, in that the surety may be held to authorize the employee to account for the monies entrusted to him, which he does when he admits the theft.[37] Despite some criticism,[38] this is nevertheless a far more rational explanation of the principal-surety rule than *res gestae*—particularly since the termination of employment terminates the extent of admissibility.

The first major New York case on the topic of fidelity bonds was *Hatch v. Elkins*.[39] There the surety had bound himself to indemnify the plaintiffs for all losses they might sustain by acting as the principal's brokers in the sale of stocks. Certain letters by the principal acknowledging the amount of the debt were admitted into evidence and the issue was the amount of the debt outstanding and the admissibility of these letters to establish said amount. The Court of Appeals observed:

> The declarations of the principal made during the transaction of the business for which the surety is bound, so as to become part of the *res gestae* are competent evidence against the surety; but his declarations subsequently made are not competent. . . . '[T]he surety is considered bound only for the actual conduct of the party, and not for whatever he might say he had done, and therefore is entitled to proof of his conduct by original evidence when it can be had, excluding all declarations of the principal made subsequent to the act to which they relate. . . .'[40]

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[36] Indemnity Ins. Co. v. Krone, 177 Ark. 953, 9 S.W.2d 33 (1928); Piggly Wiggly Yuma Co. v. New York Indem. Co., 116 Cal. App. 541, 3 P.2d 15 (1931); Alexander Grant's Sons v. Phoenix Assur. Co., 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966); Dietrich v. Dr. Koch Vegetable Tea Co., 56 Okla. 636, 156 P. 188 (1916).

[37] 2 E. MORGAN, BASIC PROBLEMS OF EVIDENCE 277 (1961):

> Where, as in a fidelity contract, the surety obligates himself to be responsible for the performance of the principal's duty of reporting accurately and honestly to the assured details of the performance of duty, it requires no strained construction to hold that the principal's acknowledgment of receipt of funds or property and confession of his tortious or criminal disposition of them made in the course of duty to the assured is a statement authorized by the surety and should be treated as if made by him. The decisions generally admit evidence of such statements when made to the assured, some treating them as admissions and others concealing the reasons in terms of res gestae. *Id.*

[38] *See* Note, *Declarations Against Interest: A Critical Review Of The Unavailability Requirement*, 52 CORNELL L. REV. 301, 312 (1967), for a criticism of the theory.

[39] 65 N.Y. 489 (1875).

[40] *Id.* at 496.

Since the statements of the principal were made, not when he was engaged in any transaction as to buying or selling stock, but after all the transactions were closed, they were not part of the *res gestae* and were therefore inadmissible. This case placed New York in the minority position since it implemented the verbal act theory and required the statements to be contemporaneous with the act in order to be *res gestae.*

Subsequent New York cases reiterated the verbal act theory. For example, in *Wieder v. Union Surety and Guaranty Company,*[41] the employer sought to establish the liability of the defendant by testifying about a conversation with the employee, after the embezzlement had occurred, wherein the employee allegedly admitted the crime. The court would not allow the admission of this evidence for such purposes observing that: "[T]he rule seems to be well settled that a party holding an indemnity cannot prove the loss sustained by him . . . by the mere admissions or statements of the principal," since the statements were not in any sense a part of the *res gestae* of the transactions out of which the alleged embezzlement arose.[42]

A further illustration of the application of the verbal act theory is *Marcus v. Fidelity and Deposit Company.*[43] There the appellate division refused to allow the plaintiff to introduce as part of the *res gestae* certain incriminating statements of the principal, who had died before trial. The court noted that the defendant could not be bound by the principal's admissions after the event since they were neither contemporaneous with the event nor so connected with it as to be considered part of the transaction.[44] Thus, the verbal act theory continued to dominate New York's law of evidence until very recent years.[45]

New York law made a profound change in direction in *Alexander Grant's Sons v. Phoenix Assurance Company of New York.*[46] There the defalcating employees gave inculpatory statements to a detective and made statements in their own handwriting admitting misappropriations while still employed by the insured. The appellate division allowed the admission of the statements as part of the *res gestae,* even though they were not contemporaneous with the act. The court distinguished *Hatch* by pointing out that the earlier case dealt with securities transactions, and should not be precedent in determining *res gestae* in an employment situation, thereby repudiating the verbal act doctrine and its requirement of contem-

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[41] 42 Misc. 499, 86 N.Y.S. 105 (App. Term 1904).
[42] *Id.* at 500, 86 N.Y.S. at 105-06.
[43] 164 App. Div. 859, 149 N.Y.S. 1020 (1st Dep't 1914).
[44] *Id.* at 861, 149 N.Y.S. at 1021.
[45] *See, e.g.,* John T. Stanley v. National Surety Corp., 179 Misc. 493, 39 N.Y.S.2d 509 (Sup. Ct. 1943).
[46] 25 App. Div. 2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966).

poraneity.[47] In addition, the case demonstrated that refusal to testify based upon the privilege against self-incrimination is sufficient unavailability for declaration against interest purposes. While the status of the law in New York was still doubtful since the great bulk of precedent supported the verbal act theory, this case provided a potential means of transition for bringing New York into the majority position.

Victor Letendre, the plaintiff in the instant case,[48] was the owner of a New York gas station. Upon going to Florida, he secured a fidelity bond from the defendant on James Tremblay, the principal, whom he had left in charge of the station. Upon his return, he discovered an inconsistency in the records of the station, and promptly notified defendant's claim agent, who handled the investigation. On June 12th and 17th, 1963, at the agent's office, Tremblay denied any theft of the monies involved. On July 9th, at the claim agent's office, Tremblay—warned that anything he said might be held against him—admitted a defalcation of at least $5000. On July 18th, upon advice of his lawyer, the plaintiff dismissed Tremblay, whose wages were being credited to the shortages. Subsequently, Tremblay retracted all his previous statements, admitting only a defalcation of $400. He explained his July 9th statement as a product of a guilty mind since his employer had suffered a loss due to his poor management. At the trial Tremblay denied any defalcations.

In order to prove his case, plaintiff sought to introduce as his principal substantive evidence Tremblay's previous incriminatory statements. Defendant made timely and proper objection to the admission of the evidence for this purpose, arguing on the basis of *Hatch* that they were extrajudicial statements made after the acts to which they related. The supreme court and the appellate division allowed the evidence and plaintiff recovered the full amount of the bond. The Court of Appeals agreed with the conclusion of the appellate division, allowing the evidence, but disagreed with the latter court's distinction of *Hatch,* thereby overruling it. It also concurred with the lower courts' conclusion that the admissibility of incriminatory statements should not be dependent upon *res gestae* or the continuation of the employment relationship. The Court announced the test to be that "[i]n an action by an employer to recover on a fidelity bond, an extrajudicial declaration made by his employee should be admissible as affirmative evidence against the surety, where the declaration is in writing and the declarant is available for purposes of cross-examination." [49]

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[47] *Id.* at 97, 267 N.Y.S.2d at 224.

[48] Letendre v. Hartford Accident & Indem. Co., 21 N.Y.2d 518, 236 N.E.2d 467, 289 N.Y.S.2d 183 (1968).

[49] *Id.* at 522, 236 N.E.2d at 469, 289 N.Y.S.2d at 187.

While the original policy reason behind the *Hatch* rule was to prevent collusion between the employer and employee, the Court found this no longer relevant. First, it was highly unlikely that an employee would admit to a crime in order to accommodate his employer. Indeed, there was a greater danger of collusion in an auto accident, yet the legislature had not felt it necessary to enact a guest statute. The facts of the case, in the majority's view, illustrated the injustice of the rule, *i.e.,* it would exclude essential evidence since plaintiff had turned over complete charge of the investigation to the defendant who had obtained the statements from Tremblay. The Court reasoned that ". . . Tremblay's statements were hearsay. Nevertheless, none of the classic dangers, which justify the hearsay rule, are present in this case." [50] In particular, the Court weighed heavily the factor that the defendant was present in court, subject to oath and the safeguard of cross-examination and that the jury had ample opportunity to assess his credibility. The Court therefore found that ". . . a departure from the general rule excluding hearsay evidence is proper here." [51] The majority also noted that the exception which it created had greater justification than declarations against interest, in which there is no opportunity to cross-examine because of the unavailability requirement. Thus the Court *in effect* left intact the declaration against interest exception, circumventing it in reaching its own conclusion.

Judge Breitel, dissenting, first discussed whether a proper objection to the evidence was made and whether the objection was preserved, affirmatively resolving both issues. The dissent then approved the *Hatch* rule, not only because of its durable quality, but also because, in its opinion, it fitted neatly into the general rules of evidence excluding hearsay. The dissent approved Wigmore's position when it stated that the "so-called *res gestae* exception is not a true exception but relates to the verbal acts of the faithless employee at the very time that he is conducting his employer's business." [52] Thus, the dissent not only disapproved the instant case, but also the *Alexander Grant's* case, because "insofar as it introduces the factor of the employee's continued employment, [it] rests on doubtful logic and an even more doubtful pragmatic basis." [53] In cases dealing with admissions and agency, the status of employment by itself is not the determining factor, since, from a practical point of view, the continuing employment relationship enhances the risk of collusion.

To the dissent, the facts of the case, rather than supporting the majority's conclusion, exemplified the increased risk of collusion.

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[50] *Id.* at 524, 236 N.E.2d at 470, 289 N.Y.S.2d at 188.
[51] *Id.*
[52] *Id.* at 529, 236 N.E.2d at 473, 289 N.Y.S.2d at 193.
[53] *Id.*

The plaintiff had admitted that, but failed to explain why, there were certain disbursements which were not recorded in the station's records. In addition, the plaintiff's continuation of Tremblay's employment raised the question of the plaintiff's credibility. In concluding, the dissent noted that, in any event, since the Court had expounded a new rule of evidence, the defendant should have been granted a new trial, since he had relied on rules of evidence now declared by the Court to be erroneous.

The significant element of the Court's reasoning was the realization that the presence of the declarant as a witness is an important factor to be considered in determining admissibility. Inasmuch as the trier does not have to look to any person other than the witness for the statement's veracity, theoretically the hearsay rule should have no application. Unfortunately, the courts do treat such statements as hearsay, but this case presents a hopeful sign of change. The Court gave at least tacit approval to the exception proposed by the Uniform Rules of Evidence that all previous statements of a declarant present for cross-examination be admissible.[54]

Perhaps the better approach would have been a re-examination of the existing exceptions, especially the unavailability requirement of declarations against interest.[55] The Court created a new exception for fidelity bond cases, yet in justifying its course of action, much of its reasoning was simply a reiteration of the probative values which support declarations against interest. Excepting the requirement of unavailability, the admission of theft by an employee would seem to fall squarely within the declaration against interest exception. The probative values of truthworthiness which support the declaration against the interest exception are sufficient to support the exception—namely an individual would not normally admit to a theft or other crime unless it were true. The unavailability requirement, a result of the necessity principle, adds nothing to the trustworthiness of a statement—rather it reduces the probability of such by precluding an opportunity to cross-examine. Therefore, it seems that the most rational approach would be to abandon the unavailability requirement—at least in the situation where the defalcations are admitted—and to make the two exceptions synonymous, especially where the statements made are contrary to one's penal interest. Such an approach would help to work the hearsay exceptions into a more orderly body of law.

The Court, obviously displeased with the state of hearsay law, unfortunately was overly cautious in revising it. While the introduction of such evidence might be more necessary in fidelity bond cases than in others, it is unwise to revise the law by creating

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[54] UNIFORM RULES OF EVIDENCE, Rule 63 (1).

[55] *See* Note, *supra* note 38. The Uniform Rules of Evidence, Rule 63(10), also advocates the abolition of this requirement.

special rules of evidence for different causes of action. Had the Court abolished the unavailability requirement, then the precedential effect of this case would not have been limited to fidelity bond cases. There is no reason, for example, why the statements of a former officer of a corporation, who is present for cross-examination, which statements admit liability for an act done while in the capacity of an officer, should be excluded as affirmative evidence against the corporation. Similar reasoning would apply to the statements of a former agent, employee, partner, or former joint owner of property, which were made in the course of the relationship. The Court of Appeals, rather than clarifying the clouded state of the law of hearsay, merely added to the confusion created by centuries of judicial evasiveness in establishing "rules" of evidence.

LABOR LAW — UNION COERCION OF GENERAL CONTRACTOR CAUSING HIM TO DISCRIMINATE AGAINST SUBCONTRACTOR EMPLOYEES HELD NOT TO BE AN UNFAIR LABOR PRACTICE SINCE THE EMPLOYEES WERE NOT HIS OWN. — A union local, whose members were employed by a general contractor, picketed a construction site and conducted a work stoppage to protest a subcontractor's use of non-union labor, thereby forcing the general contractor to cancel its contract with the subcontractor. The subcontractor filed an unfair labor practice charge against the union alleging unlawful coercion of the general contractor forcing him to discriminate against the subcontractor's employees. The National Labor Relations Board *held* that no unfair labor practice was committed by the union because the prohibition against the unlawful coercion of an employer which forces him to discriminate against employees applies only where the employees are those of the coerced employer. *Local 447, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry (Malbaff)*, 172 N.L.R.B. No. 7, 5 CCH LAB. L. REP. (1968-1 CCH NLRB Dec.) ¶22,652 (June 24, 1968).

The original National Labor Relations Act [1] [hereinafter referred to as the NLRA], was passed for the express purpose of eliminating the causes underlying labor disputes which obstructed interstate commerce,[2] but was generally thought to be too labor and

[1] The National Labor Relations Act (Wagner Act) of 1935 was amended by the Labor-Management Relations Act (Taft-Hartley Act) of 1947 and the Labor-Management Reporting & Disclosure Act (Landrum-Griffin Act) of 1959 and is currently found in 29 U.S.C. §§ 151-66 (1964).

[2] Myers, *The National Labor Relations Act in Strike Situations*, 18 B.U.L. REV. 282, 283-84 (1938).